No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

RUTH O. SHAW, et al.,
Appellants,
and
JAMES ARTHUR "ART" POPE, et al.,
Plaintiff-Intervenors,

v.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, et al.,
Appellees,
and
RALPH GINGLES, et al.,
Defendant-Intervenors.

APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

JURISDICTIONAL STATEMENT

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44 pp

QUESTIONS PRESENTED

I

WAS NORTH CAROLINA'S RACIALLY GERRYMANDERED REDISTRICTING PLAN ENACTED WITHOUT A COMPELLING STATE INTEREST FOR DOING SO?

II

DID THE GENERAL ASSEMBLY ENACT NORTH CAROLINA'S RACIALLY GERRYMANDERED REDISTRICTING PLAN WITHOUT NARROWLY TAILORING IT?

III

DID THE COURT BELOW NEGATE THE "STRICT SCRUTINY" TEST BY MISALLOCATING THE BURDEN OF PERSUASION, RELYING ON POST HOC RATIONALIZATIONS, AND MAKING CLEARLY ERRONEOUS FINDINGS OF FACT?

THE PARTIES

Appellants, Plaintiffs in the action below, are as follows:
RUTH O. SHAW, MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT, and DOROTHY BULLOCK.

Plaintiff-Intervenors in the action below, are as follows:
JAMES ARTHUR "ART" POPE, BETTY S. JUSTICE, DORIS LAIL, JOYCE LAWING, NAT SWANSON, RICK WOODRUFF, J. RALPH HIXON, AUDREY McBANE, SIM A. DELAPP, JR., RICHARD S. SAHLIE, and JACK HAWKE, Individually.

Defendants in the action below, are as follows:
JAMES M. HUNT, JR., in his official capacity as Governor of the State of North Carolina; DENNIS A. WICKER, in his official capacity as Lieutenant Governor of the State of North Carolina, and President of the Senate; DANIEL T. BLUE, JR., in his official capacity as Speaker of the North Carolina House of Representatives; RUFUS L. EDMISTEN, in his official capacity of Secretary of the State of North Carolina; THE NORTH CAROLINA STATE BOARD OF ELECTIONS, an official agency of the State of North Carolina; EDWARD J. HIGH, in his official capacity as Chairman of the North Carolina State Board of Elections; JEAN H. NELSON, in her official capacity as a member of the North Carolina

State Board of Elections, LARRY LEAKE, in his official capacity as a member of the North Carolina State Board of Elections, DOROTHY PRESSER, in her official capacity as a member of the North Carolina State Board of Elections, and JUNE K. YOUNGBLOOD, in her official capacity as a member of the North Carolina State Board of Elections.

and

Defendant-Intervenors in the action below, are as follows:
RALPH GINGLES, VIRGINIA NEWELL, GEORGE SIMKINS, N. A. SMITH, RON LEEPER, ALFRED SMALLWOOD, DR. OSCAR BLANKS, REVEREND DAVID MOORE, ROBERT L. DAVIS, C. R. WARD, JERRY B. ADAMS, JAN VALDER, BERNARD OFFERMAN, JENNIFER McGOVERN, CHARLES LAMBETH, ELLEN EMERSON, LAVONIA ALLISON, GEORGE KNIGHT, LETO COPELEY, WOODY CONNETTE, ROBERTA WADDLE, and WILLIAM M. HODGES.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

CONSTITUTIONAL PROVISIONS:

STATUTES:

TABLE OF AUTHORITIES (Continued)

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OPINIONS BELOW

The judgment and opinion, as amended, of the three-judge district court are contained in the Appendix to Jurisdictional Statements filed jointly by these

appellants, who were the five original plaintiffs, and by the eleven plaintiff-intervenors, who are also appealing [hereafter "App.J.S."], at pages 1a to 154a.

JURISDICTION

The district court entered judgment against appellants on August 1, 1994, and at the same time a majority opinion was filed, as well as the dissenting opinion of Chief Judge Voorhees. On August 15, 1994, plaintiffs filed a motion to amend and add findings pursuant to Rule 52(b) of the Federal Rules of Civil Procedure. On August 22, 1994, amended opinions were filed by the majority and the dissenting judge in the district court. On August 29, 1994, plaintiffs filed a notice of appeal. On September 1, 1994, the district court denied plaintiffs' 52(b) motion and on September 15, 1994, the plaintiffs filed a supplemental notice of appeal. Subsequently, pursuant to Rule 22 of the Rules of the Supreme Court, the plaintiffs and plaintiff-intervenors filed a motion applying for a determination that the time for docketing the appeals in this case, together with the consolidated single appendix to the jurisdictional statements of plaintiffs and plaintiff-intervenors, run to and including November 21, 1994. This motion was granted by the Chief Justice. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case arises under the Fourteenth and Fifteenth Amendments to the Constitution of the United States and involves Sections 2 and 5 of the Voting Rights

Act of 1965, as amended, 42 U.S.C. §§ 1973b, 1973c (1973), which are reprinted in Plaintiff-appellants' Appendix to this Jurisdictional Statement (pp.A1-A-4). The appeal concerns the constitutionality of Chapter 7 of the 1991 Extra Session Laws of North Carolina (hereinafter "Chapter 7"), the challenged congressional redistricting statute and amends Chapter 163, Article 17 of the North Carolina General Statutes. Chapter 7 is reprinted at App.J.S. pp. 169a to 240a. A map of the Chapter 7 congressional plan was appended to the Court's Opinion in the first appeal of this case, *Shaw v. Reno*, ___U.S.___,113 S.Ct. 2816 (1993) (hereafter "*Shaw*").

STATEMENT OF THE CASE

This appeal from the decision rendered by a divided three-judge district court raises substantial questions concerning the constitutionality of the current North Carolina congressional redistricting plan.[1] All three judges in the court below found this plan to be a racial gerrymander. However, a majority concluded that the plan survived "strict scrutiny" because it was "narrowly tailored to further the State's compelling interest in complying with theVoting Rights Act." (App.J.S. at 7a). That conclusion gave rise to this appeal.

The challenged redistricting plan was enacted by the General Assembly on January 25, 1992, after an

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1 Chief Judge Voorhees' extensive dissent in the court below makes obvious the importance of these questions. (App.J.S. at 116a-154a) *See also* footnote 55 of Judge Edith Jones' opinion in *Vera v. Richards*, No. H-94-2077 (S.D.Tex. Aug. 17, 1994)

earlier plan had been denied preclearance by the Attorney General pursuant to Section 5 of the Voting Rights Act, *see* 42 U.S.C. § 1973c. The current plan first was attacked unsuccessfully as an unconstitutional political gerrymander directed against Republicans. *Pope v. Blue*, 809 F.Supp. 392 (W.D.N.C. 1992), *affirmed* 506 U.S. ____, 113 S.Ct. 30 (1992). Then on March 28, 1992, the five plaintiff-appellants filed an action against various Federal and State officials in which they alleged that the redistricting plan was an unconstitutional racial gerrymander.

The district court granted motions to dismiss as to all the defendants, although Chief Judge Voorhees dissented from the ruling that the plaintiffs had failed to state a claim for relief against the State defendants. *Shaw v. Barr*, 808 F.Supp. 461 (E.D.N.C. 1992). Upon appeal, this Court upheld the dismissal below of the Federal defendants; but it decided that, under the Equal Protection Clause of the Fourteenth Amendment, the five plaintiffs had stated a claim for relief against the State defendants. *Shaw*, *supra* [2] The case was remanded to the three-judge court for it to decide whether the redistricting plan was a racial gerrymander, as the plaintiff-appellants had alleged, and, if so, whether the plan was justified by "a compelling governmental interest" and was "narrowly tailored". (*Shaw*, 113 S.Ct. at 2832)

Upon remand, the district court allowed twenty-two registered voters from various congressional districts to intervene as defendants. Eleven other registered voters

2 The Court did not find it necessary to decide whether plaintiffs had also stated a claim for relief under Article I, § 2 of the Constitution or under the Fifteenth Amendment.

were permitted to intervene as plaintiffs.[3] Extensive discovery then commenced with defendants taking the five plaintiffs' depositions; and thereafter the various parties deposed numerous experts, as well as some legislators and lay witnesses. In some instances, discovery was limited by an order of the district court which recognized a "legislative privilege" on the part of the General Assembly's members and staff.

After discovery had been completed, the plaintiff-intervenors moved to enjoin the defendants from conducting any further election under the current redistricting plan. Over Chief Judge Voorhees' dissent, the motion was denied. Likewise, the plaintiffs failed in their motion *in limine* to prevent the defendants from offering evidence based on census data and socioeconomic information which had not become available until January 1993 -- a year after enactment of the redistricting plan.

On March 28, 1994, a six-day trial commenced, at which each of the four groups of parties was allowed to call one expert and one lay witness, as well as to offer in evidence extensive stipulations, depositions, and other documentary evidence.[4] On August 1, 1994, judgment was entered for the defendants with Chief Judge Voorhees

3 Jack Hawke, the Chairman of the Republican Party of North Carolina, was allowed to intervene individually as a plaintiff, but not in his official capacity.

4 Also, at a computer workstation the three judges viewed a demonstration of how computer technology and census bloc information had been used together to draw the boundaries of congressional districts in North Carolina.

dissenting; and majority and dissenting opinions were filed. On August 22, 1994, amended opinions were filed. Meanwhile, the plaintiffs had moved to amend and add findings pursuant to Fed. R. Civ. P. 52(b); but this motion was denied on September 1, 1994 -- again over the dissent of Chief Judge Voorhees. Plaintiffs and plaintiff-intervenors all duly filed notices of appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

On their prior appeal, the five plaintiff-appellants presented squarely to this Court the question of whether they could attack a racially gerrymandered redistricting plan which had been enacted by the General Assembly in order to assure that two African-Americans would be elected to Congress from North Carolina. Reversing the majority decision of the three judges, this Court ruled that, as registered voters, the plaintiffs -- regardless of their race -- had stated a claim for relief. However, upon remand, it would be necessary for them to prove their allegations at trial; and, if they did so, the plan would be subject to "strict scrutiny" to "determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest". (113 S.Ct. at 2832)

By means of overwhelming direct and circumstantial evidence -- and over the defendants' stubborn opposition[5] -- the plaintiffs convinced all three

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5 During the oral argument before this Court, Mr. Powell, who represented the State defendants, responded to a question from the Court: "There's no dispute here over what the State's purpose is.
(continued...)

judges of the court below that the redistricting plan is a racial gerrymander. Moreover, the district court properly interpreted *Shaw* to mean that voters of all races have standing to attack North Carolina's racial gerrymander.[6]

5(...continued)
There's a dispute over how to characterize it legally, but we're not in disagreement over what the State legislature was trying to do" (Transcript of Oral Argument at p.38). As plaintiff-appellants interpreted this statement, the State conceded that the redistricting plan was a racial gerrymander, but contended that such a gerrymander was constitutional. Nonetheless, upon remand, the defendants hotly contested that a racial gerrymander had been enacted.

6 The evidence at trial made clear that plaintiffs Shaw and Shimm, who reside in the Twelfth Congressional District, not only have suffered injury to their "personal dignity" by being assigned to vote on a racial basis but also have suffered other injury. The shape of the "bizarre" district in which they have been placed reflects its purpose to guarantee that an African-American will be elected to Congress; and white voters like plaintiffs Shimm and Shaw perceive that the Representative elected from the district is "more likely to believe [his] primary obligation is to represent only "African-Americans:. *See Shaw*, 113 S.Ct. at 2832. This perception of having "second class status" discourages these voters from participating actively in congressional primaries and elections. [Transcript 1089-1090 (Shimm Testimony)]. The correctness of their perception was corroborated recently when Twelfth District Congressman Melvin Watt stated during a panel discussion "that it adds to the debate to be able to bring up a perspective *without catering, or having to cater to the business or white community.*" [Transcript p. 999, (Watt Testimony)] (emphasis supplied). [*See also* footnote 5 of Chief Judge Voorhees' dissent, (App. J.S. 128a)] Congressman Watt's mindset is also revealed by his statement on the McNeilll-Lehrer television program that he had "characterize[d] Justice O'Connor's opinion in *Shaw* as "racist". [Transcript 995 (Watt Testimony)]. Plaintiffs Shaw
(continued...)

Consequently, the district court was required to apply the "strict scrutiny" test to the gerrymander; and its misapplication of that test presents on this appeal the substantial and important questions of what constitutes a "compelling State interest" and when a racially gerrymandered plan is "narrowly tailored".[7]

This appeal also presents substantial and important questions about the methodology employed by the court below in applying the "strict scrutiny" test. Paradoxically, the burden was placed on the plaintiffs of persuading the factfinders that there was no "compelling State interest" and that the gerrymander was not "narrowly tailored" (App.J.S. 42a-43b). Furthermore, despite an extensive legislative record to the contrary, the majority in the district court accepted "post hoc rationalizations" in assuming the presence of a legislative intent which could

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6(...continued)
and Shimm, along with *all* other voters in the Twelfth District, were specially injured by being placed in that district because its confusing boundaries and its bisecting of several Metropolitan Statistical Areas (MSA's) and media markets make the district "dysfunctional". [Transcript pp. 209, 219-220, 232 (O'Rourke Testimony)]

7 The importance of these questions is underscored by the fact that three-judge district courts in Louisiana, Texas, and Georgia have also been recently required to apply the "strict scrutiny" test to racially gerrymanderered congressional redistricting plans. [*See Hays v. Louisiana*, 839 F.Supp. 1188 (W.D.La. 1993) (*Hays I*) *vacated*, *Louisiana v. Hays*, 114 S.Ct. 2731, adopted by reference, *Hays v. Louisiana,(Hays II)* No. 92-1522 (W.D.La. 1994); *Vera v. Richards*, *supra*, n.1; *Johnson v. Miller*, No. 194-008 (S.D.Ga. Sept.12, 1994)

not possibly have existed.[8] This Court should decide whether these evidentiary rulings were contrary to the spirit and purpose of the "strict scrutiny" test.[9]

I. The Evidence Reveals Clearly that North Carolina's Racially Gerrymandered Redistricting Plan Did Not Further A Compelling State Interest.

Having found on remand that the plaintiffs had proved the redistricting plan to be a racial gerrymander, the three-judge district court should have subjected it to "strict scrutiny". *Shaw, supra*; *cf. Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Unfortunately, only Chief Judge Voorhees applied this test correctly -- while the majority below ignored undisputed evidence which demonstrated the absence of any "compelling State interest".

The majority's first mistake was in stating the issue to be whether the State "had a compelling interest in enacting *any* race-based redistricting plan" -- rather than "enacting the *particular* race-based redistricting plan under challenge" (App.J.S. at 43a-44a) (emphasis in original). In this way, the burden to be carried by the State was

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8 The majority inferred the legislative intent from census data and socioeconomic information which only became available a year after Chapter 7 was enacted. This technique for determining legislative intent was criticized in *Hays I, supra*, n.7

9 The erroneous evidentiary rulings in the court below led to clearly erroneous findings. Plaintiff-appellants attempted to clarify the record for appellate review by moving under Rule 52(b) to amend and add findings; but this motion was denied.

reduced far below what *Shaw* had in mind in requiring that "strict scrutiny" be given to racial gerrymanders.

Under *Shaw* it should be immaterial that the State might be able to imagine a "compelling governmental interest" in enacting some hypothetical redistricting plan -- such as a plan which is "race-based" in that it seeks to avoid splitting neighborhoods in which African-Americans or Native Americans are concentrated. The real question that the court below should have answered was whether North Carolina had a "compelling governmental interest" in enacting a redistricting plan which, in order to create two majority- black districts and guarantee the election of two African-Americans to Congress, ignored traditional redistricting principles, such as compactness, contiguousness, communities of interest, and maintenance of the integrity of political subdivisions. On the evidence at trial, the answer to that question should have been in the negative.[10]

The majority in the court below stretches the facts in a vain attempt to give an affirmative answer to its misleading question whether "any race-based redistricting plan" could have been justified by "the State's compelling interest in complying with the Voting Rights Act". (App.J.S. 7a, 44a-57a) According to its version, after the

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10 It is doubtful that any state interest could be so "compelling" as to permit the total disregard of traditional redistricting principles which is manifested by the North Carolina racial gerrymander. *Shaw* indicates that a majority-black district can only be created when the State "employs sound districting principles" and only when the affected racial group's "residential patterns offer the opportunity of creating districts in which they will be in the majority". 113 S.Ct. 2832.

first redistricting plan was denied preclearance, the General Assembly "reasonably conclude[d], after conducting its own independent reassessment of the rejected plan in light of the concerns identified by the Justice Department, that the Justice Department's conclusion is legally and factually supportable". (App.J.S. at 54a)

From the summer of 1991, when the first redistricting plan was enacted, until after it was denied preclearance on December 18, 1991, State officials consistently took the position that the first plan -- which contained only one minority-black district -- adequately complied with the Voting Rights Act. Moreover, even after the denial of preclearance, a court action in the District of Columbia was considered by the General Assembly -- until a method was suggested for satisfying the demands of the Department of Justice and at the same time protecting Democratic incumbents and candidates. Clearly the enactment of the redistricting plan was not the result of a newly-formed belief by the General Assembly that two majority-black congressional districts were necessary to comply with Sections 5 and 2. Instead, the legislature made a tactical choice to accede to demands by the Attorney General that were generally perceived as unreasonable.[11]

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11 In their answer, the State defendants alleged that the Attorney General's "interpretation of the Voting Rights Act...required the creation of two majority-minority congressional districts in North Carolina" (Defendants Answer para.23); that to "comply with Section 2 of the Voting Rights Act, the State was required to enact a congressional redistricting plan with two majority-minority districts in

(continued...)

Shaw recognized that states have an interest "in complyin with federal antidiscrimination laws that are constitutionally valid *as interpreted and as applied.*" 113 S.Ct. 2830 (emphasis supplied). By negative implication this statement suggests that a state has no "compelling interest" in complying with requirements for Section 5 preclearance which far exceed the intent of the Voting Rights Act and violate the Equal Protection Clause. Certainly *Shaw* did not intend to immunize racial gerrymanders enacted by a legislature which surrendered to unreasonable interpretations of the Voting Rights Act by the Attorney General. Otherwise, in practical effect, the Civil Rights Division could expand the Voting Rights Act beyond what Congress intended or the Constitution permitted.[12]

The undisputed evidence offered at trial makes clear that the Civil Rights Division was using its preclearance power under Section 5 to rewrite the Act by requiring proportionate representation. On January 24, 1992 -- the day when the current redistricting plan was

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11(...continued)
order to avoid dilution of African-American voting strength". (Ans. Fifth Defense) In effect, these allegations admit the fact, demonstrated by uncontradicted evidence, that the General Assembly enacted the second redistricting plan, because otherwise preclearance would be denied by the Civil Rights Division and not because of any "independent reassessment of the rejected plan".

12 Furthermore, a State's interest in obtaining preclearance from the Department of Justice is not "compelling", because the State has available to it the alternative of seeking preclearance in the District Court of the District of Columbia with direct appeal to the Supreme Court. 42 U.S.C. § 1973c.

enacted -- Senator Dennis Winner, the Chairman of the Senate Redistricting Committee, described to the North Carolina Senate what had occurred at a meeting that he, Speaker Daniel Blue, and others had with Assistant Attorney General John Dunne on December 17, 1991, the day before preclearance had been denied: [13]

> And I could not figure out why they called us up there and don't understand that to this day. And Mr. Dunne, some of the staff asked a question or two or said -- made an occasional comment, Mr. Dunne did most of the talking. The essence of what he said at that meeting was -- and he said this in different ways over, and over, and over again -- you have twenty-two percent black people in this State, you must have as close to twenty-two percent black Congressmen, or black Congressional Districts in this State. Quotas.

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13 See Daily Proceedings in the Senate Chamber for Friday, January 24, 1992, at p. 4. At his pretrial deposition, Senator Winner waived his "legislative privilege" and testified that, at the meeting in Washington on December 17, 1991, Assistant Attorney General John Dunne had told him and other representatives of the General Assembly, "that we ought to have a quota system with respect to minority seats. You had 22 percent blacks in this state. Therefore, you ought to have as close to that as you could have of congressional districts. That is really all I remember about it . . . . I think his substance was really that you had -- if you had 22 percent blacks in North Carolina that you ought to have 22 percent minority congressional seats. Whatever shape didn't matter." (Winner Deposition Jan. 11, 1994. pp. 6, 10, 17-19)

Senator Winner's account of the position taken by Assistant Attorney General Dunne is corroborated by the language of Dunne's letter of December 18, 1994, denying preclearance. Also, it fits perfectly with the findings of other three-judge district courts that the Civil Rights Division required maximization of majority-black districts as a requirement for preclearance of redistricting plans in Louisiana and Georgia. *See Hays I, supra; Johnson v.* **Miller, supra.**

Maximization of majority-minority districts is not required by the Voting Rights Act. ***Johnson v. DeGrandy, ___U.S. ___, 114 S.Ct. 2647 (1994). Indeed, as the three-*** judge district court explained in footnote 21 of *Hays,* **supra,** ***the Civil Rights Division's insistence on*** maximization of majority-minority districts not only is unauthorized by the Voting Rights Act but also contravenes Section 2's prohibition of requiring proportional representation.[14] Yet that insistence, to which the General Assembly of North Carolina capitulated, was erroneously relied on by the majority in the court below to find "a compelling State interest" which overcomes the equal protection rights of the plaintiff-appellants.[15]

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14 (839 F.Supp. 1196-7, n.21). In his majority opinion in *Johnson v. Miller, supra,* Judge Edenfield has described in some detail the questionable and coercive tactics used by the Civil Rights Division in its effort to make the Georgia legislature follow a policy of maximizing majority-black districts.

15 To allow a "Nuremberg defense" and find as a "compelling interest" that the State was forced to comply with the Section 5 preclearance requirements imposed by the Civil Rights Division tends

(continued...)

The majority in the court below also found that the denial of preclearance caused the General Assembly to become fearful that any redistricting plan without two majority-black districts would violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. To this end, the majority equated the letter of December 18, 1991 denying preclearance to "an 'administrative finding' that its proposed plan violates the anti-discrimination provisions of the Voting Rights Act, which is sufficient -- unless clearly legally and factually unsupportable -- to justify its adoption of a race-based alternative plan designed to remedy that violation". (App.J.S. p. 54a, n. 34)

Treating the letter in this manner gives it an effect not suggested by its language. Moreover, Congress never intended that a denial of preclearance by the Civil Rights Division would give rise to a "compelling State interest" in enacting a racial gerrymander. In any event, the "administrative finding" by Assistant Attorney Dunne was "clearly legally and factually unsupportable" because of its false premise that the maximization of minority-black districts is required by the Voting Rights Act.

The three preconditions for establishing vote dilution in multi-member districts in violation of Section 2 are that a minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district"; that it be "politically cohesive"; and that "the white majority vot[e] sufficiently as a block to enable it...usually to defeat the minorities preferred

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15(...continued)
to induce collusion between the Department of Justice and State legislatures in creating racial gerrymanders.

candidates". *Johnson v. DeGrandy, supra*; *Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1986). The same preconditions apply to single-member congressional districts. *Growe v. Emison,*507 U.S.____, 113 S.Ct. 1075 (1993).

As this Court recognized in *Shaw*, the black population of North Carolina is "relatively dispersed; blacks constitute a majority of the general population in only 5 of the State's 100 counties" (113 S..Ct. at 2820). Consequently, a congressional redistricting plan would not violate Section 2 of the Voting Rights Act, even if it contained *no* majority black districts.[16]

After enacting the first redistricting plan -- which had only one majority-black district -- the General Assembly contended for months that it complied fully with Section 2 and that because of the lack of "geographical compactness" of the black population, *Gingles* did not

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16 In North Carolina the second *Gingles* precondition is met, for ninety-five percent or more of the African-American voters are registered as Democrats and they vote cohesively for black Democratic candidates. On the other hand, the third precondition is absent. White voters in North Carolina are less cohesive than blacks and often are disposed to vote for black candidates against whites. (Keech Deposition, (*passim*) For example, in her deposition, (at p. 34) plaintiff Shaw testified in response to defendants' questions that in 1982 and 1984 she had voted in the Democratic congressional primary for an African-American candidate against a white candidate. As a result of "white crossover", a number of African-Americans have been nominated or elected for local and state office even when black voters were not in the majority.

apply.[17] Under these circumstances, the effort by the majority in the court below to find a "compelling State interest" in the imagined desire of the General Assembly to avoid a Section 2 violation is devoid of any factual or legal basis.

Although the majority purports to invoke various other "compelling State interests", clearly its real concern is with the "interest" in guaranteeing greater racial diversity of North Carolina's congressional delegation in order to make reparations for the absence of any black member of Congress from North Carolina since 1901. Thus, the majority opinion refers in its "Conclusion" to "the inability of any African-American citizen of North Carolina, despite repeated responsible efforts, to be elected in a century". (App.J.S. at 114a). Consequently, the question is raised whether, by means of a racial gerrymander, a state may establish racial quotas for its congressional delegation because of a "compelling interest" in rectifying supposed past discrimination.

To use quotas, however, furthers no "compelling interest" but, instead, leads only to the disaster of "Balkanization" and racial polarization. Especially when traditional redistricting criteria are disregarded and

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17 As the legislative record shows, Daniel Blue, the Speaker of the House of Representatives, and "Toby" Fitch, a co-chairman of the House's Redistricting Committee -- both of whom are African-Americans -- signed submissions to the Department of Justice which were intended to make clear that the *Gingles* preconditions were not met. In his deposition, Senator Winner stated that it had been his belief that Section 2 of the Voting Rights Act did not require the creation of even one minority-black congressional district in North Carolina.

"bizarre" districts are formed, the State sends a clear message that it accepts and relies on racial stereotypes and, by so doing, perpetuates and reinforces those stereotypes and destroys confidence in the electoral process. *Cf., J.E.B. v. Alabama ex rel. T.B.*, ___U.S.___ 114 S.Ct. 1419 (1994) (condemning reliance on gender stereotypes).[18]

Furthermore, some of the burden of the quotas falls upon voters who had no connection with the past discrimination. Thus, plaintiff Shaw, who moved to North Carolina from Minnesota, and plaintiff Shimm, who came from New York, had no part to play in any past discrimination against blacks in North Carolina;[19] and yet, they have been placed in a dysfunctional minority-black congressional district, where they correctly perceive that they have "second-class status" and that their political participation is discouraged. Indeed, the mobility of the American population (see Stipulation 146) allows little relationship to exist between those whites who perpetrated past discrimination against blacks and those whites subjected to the burdens of racial gerrymandering -- or between the blacks who were the victims of past

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18 The Court seems to be increasingly committed to the view that States must be neutral with respect to their citizens and groups of citizens. *Cf., Board of Education of Kiryas Joel Village School District v. Grumet*, ___U.S.___, 114 S.Ct. 2481 (1994) (disapproving boundaries of school district gerrymandered to further religious instruction).

19 Ironically, as Professor Shimm testified in his deposition, members of his family had undergone persecution in the Holocaust; and he personally had been a victim of discrimination -- rather than a perpetrator.

discrimination and those blacks who are now the intended beneficiaries of racial quotas for political office.

The majority's rationale also is based on the false premise that African-Americans can be elected to Congress from North Carolina only from majority-black districts. Since approximately 95% of the registered black voters in North Carolina are Democrats and the Democrats have closed primaries, a good opportunity exists for an African-American to obtain the Democratic nomination and be elected from a district where blacks are not a majority. In a number of recent elections, blacks have won local and statewide offices in races against whites. Moreover, in order to enhance the opportunity for minority candidates to be elected, the General Assembly changed the election laws in 1989 to dispense with a second primary if the leader in the first primary received more than 40% of the votes cast. (N.C.G.S. § 163-111; Stipulation 127).

The reference by the majority in the court below to "repeated responsible efforts" of African-Americans to be elected to Congress is misleading. The only serious efforts were in the Second District. The first two of those efforts by black candidates (Eva Clayton and Howard Lee) were against an experienced and well-entrenched incumbent (L. H. Foutain). The more recent efforts were in 1982, when an African-American candidate (H.M. Michaux, Jr.) received 46% of the vote in the Democratic primary in the Second District; [20] and in 1984, when a

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20 Under the 1989 change in the election code, H.M. Michaux, Jr., the African-American, who led in the first primary and received

(continued...)

different African-American candidate received 48% of the vote.[21] Under these circumstances, there is ample reason to believe that in some congressional districts drawn pursuant to traditional redistricting principles African-Americans would be elected from North Carolina.[22]

Even if it were assumed that blacks can only be elected to Congress from North Carolina if majority-black districts are created, the substantial question remains whether the interest in achieving this diversity is so "compelling" as to justify the creation of dysfunctional congressional districts that totally disregard traditional redistricting principles such as compactness, contiguousness, communities of interest, and maintaining the integrity of political subdivisions. In an extensive footnote, the majority in the court below opines that "objective evidence" reveals -- "perhaps counter-intuitively"

20(...continued)
more than 40% of the vote, would have won the Democratic nomination.

21 Both African-American candidates were from Durham, and received many "white crossover" votes from white voters such as plaintiff Shaw. In 1984, Kenneth Spaulding, the black candidate, ran against Tim Valentine, who had defeated Michaux two years before and was now an incumbent. Thus, the increased percentage of the vote for the African-American candidate is even more significant.

22 In view of the small number of black candidates for Congress until 1992, it is a fallacy to conclude -- as did the majority below -- that blacks could not be elected from North Carolina without a racial gerrymander. The same logic would lead to the erroneous conclusion that because women had never been elected to Congress in the past they could not be elected without the benefit of a quota.

-- that "bizarre", "ugly" shapes really make no difference because, in due course, voters will learn who represents them in Congress. (App.J.S.. at p. 106a, n. 60).

This observation by the majority brushes aside as irrelevant the evidence at trial concerning confusion on the part of voters as to their district and their representative.[23] It ignores evidence that, according to a poll commissioned by the State defendants in the fall of 1993, only 6% of the voters knew who was their congressman.[24] It disregards the adverse effects on "political access" of having districts like the Twelfth -- which is not compact and extends through three Metropolitan Statistical Areas (MSA's) and three media markets.[25] Finally, it is at odds with the purpose of

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23 For example, the affidavit of David Stradley (Exhibit 104) describes the confusion in his princinct, the Chambersburg precinct in Iredell County, which is split among three congressional districts. The headline "2nd, 12th District lines still unclear for many voters", which appeared in the Durham, North Carolina Herald-Sun on November 9, 1994 (at p.A7), attests to the continuing confusion of voters about the boundaries of congressional districts.

24 According to the poll, which was commissioned by the State and conducted in October and November 1993, only 6% of those polled in the Twelfth District knew that their congressman was Melvin Watt. On the other hand, 6% believed their congressman was [Senator] Jesse Helms; 8% believed their congressman was Alex McMillan [who represented the Ninth District] and 12% believed their congressmana was Howard Coble, [who represented the Sixth District]. [Transcript at 841-842, 866-869 (Lichtman Testimony)].

25 Professor Timothy O'Rourke explained that a geographically compact congressional district serves in many ways the interests of

(continued...)

2 U.S.C. § 2(c), which requires single-member congressional districts.[26]

Implicit in the majority's opinion is the view that a state has a compelling interest in guaranteeing "descriptive representation".[27] This view is based on a racial stereotype -- only a black officeholder can adequately represent blacks[28] -- that *Shaw* condemns.[29] This Court

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25(...continued)
"political access" of voters to their representatives and to candidates for office. [Transcript, pp. 209-220 (O'Rourke Testimony)]

26 Presumably, the requirement of single-member districts was imposed in order to enhance "political access" to Representatives. Congress did not require that a member of Congress reside in the district from which he or she is elected. However, it probably never contemplated that -- as happened in North Carolina on November 8, 1994 -- Sue Myrick, who resides in the Twelfth District, would be elected to Congress from the Ninth District (see The Herald-Sun. Durham, N.C., November 10, 1994 (at C-3) and that Walter Jones, Jr., who resides in the First District, would be elected to Congress from the Third District.

27 In her recent book about the representation of black interests in Congress, Carol Swain, an African-American political scientist, makes the important distinction between "descriptive representation" -- representation by black officeholders -- and "substantive representation" -- representation by someone who advances the interests of black voters. See Swain, Black Faces, Black Interests, page 5 (1993).

28 The logical, but equally unacceptable, corollary would be that only white officeholders can adequately represent the interests of white voters.

(continued...)

should now decide whether *Shaw* permits reliance on such racial stereotypes to establish a "compelling State interest" which justifies a racial gerrymander.

II. North Carolina's Redistricting Plan Was Not "Narrowly Tailored"

Even the majority in the court below concedes that the two majority-black districts "are not the two most geographically compact... that could have been created were no factors other than equal population requirements and effective minority-race voting majorities taken into account" (Finding 4, App.J.S. p.109a).[30] The ensuing attempt to excuse this lack of compactness (see Findings 5 and 6) raises substantial questions both as to whether "narrow tailoring" has been established and as to the legitimacy of the methodology the majority employed.[31]

The requirement of "narrow tailoring" suggests the

29(...continued)
29 The rejection of racial stereotypes in *Shaw* follows a line of cases stemming from *Batson v. Kentucky*, 476 U.S. 79 (1986). Recently, in extending *Batson* to prohibit gender-based peremptory challenges, this Court denounced gender stereotypes, *J.E.B. v. Alabama ex rel. T.B., supra.*

30 According to a study, North Carolina's Twelfth District is the least "geographically compact" out of all 435 districts in the United States. Moreover, North Carolina has four of the 28 least geographically compact congressional districts. [Transcript p. 217 (O'Rourke Testimony)].

31 The majority's dubious methodology is the subject of question III in this Jurisdictional Statement.

need for an effort to match the remedy with the supposed harm.[32] No such effort was made in drawing North Carolina's redistricting plan. For example, at the time of redistricting, blacks in the Twelfth District were registered to vote at a slightly higher rate (54.71%) than whites (53.34%). Only two of the ten counties bisected by the Twelfth District are among the 40 North Carolina counties which have been subject to preclearance at any time; and only 73.4% of the voters in the Twelfth District reside in the eight counties never covered under Section 5. Futhermore, of the forty counties covered under Section 5, sixteen are outside either the First or Twelfth District.[33]

Thus, many of the persons who were subjected to the most baneful effects of the racial gerrymander did not reside in the areas where blacks had not been participating equally in the electoral process when the Voting Rights Act was enacted. Also, many of the African-Americans who received the supposed benefits of being placed in minority-black districts were not those who at some earlier time had been precluded from equal political participation. These disparities reflect the absence of "narrow tailoring".

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32 *Cf. Richmond v. J.A. Croson Co., supra.* Insistence on this matching would parallel the imposition of due process requirements of "essential nexus", "rough proportionality", and "individualized determination" when property is taken for a paublic purpose. *Dolan v. City of Tigard,* ___U.S.___, 114 S.Ct. 2309 (1994).

33 Because of their proximity to the majority-black districts, 11 of the 16 covered counties could readily have been included in such districts if the General Assembly had "narrowly tailored" the districts to remedy past discrimination.

The finding by the majority in the district court that there were "internally homogeneous commonalities of interest" in the majority-black districts is at odds with the testimony of defendants' witness, Gerry Cohen, that the blacks residing in the major cities of the Twelfth District "have been tied together with corridors with a requisite number of whites to meet the one-person, one-vote standard". [34] Thus, "homogeneity" was equated with race in a manner condemned by *Shaw*. Furthermore, the creation of these "corridors" violated the equal protection rights of whites by purposefully directing against them the adverse effects of the fragmentation of precincts and census blocks.[35]

The majority's description of the "homogeneity" of the "rural" First District is irreconcilable with the undisputed evidence that the First District divides twelve towns with a population of 10,000 or more; [36] and the

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34 [Transcript at p. 614 (Cohen Testimony)] Cohen played the major role for the General Assembly in using computer technology to draw the districts; and he personally operated the computer terminal utilized for this purpose. Plaintiff-appellants Shaw and Shimm live in one of the "corridors of whites" to which Cohen alluded.

35 To create two majority-black districts, it was necessary to divide various precincts and even census blocks. Predominantly white precincts and census blocks were divided, but predominantly black were not. [Transcript pp. 496, 613, 614 (Cohen Testimony); Transcript pp. 94-100, 106, 107, 189, 190 (Hofeller Testimony)] .

36 Fayetteville has a population of 75,928, of which 20, 337 blacks and 5,940 whites were placed in the First District; Greenville has a population of 45,000, of which 13,197 blacks and 5,082 whites

(continued...)

entire legislative record -- which was an exhibit at trial -- contains no reference to the "distinctiveness" and "homogeneity" of the voters placed in the two majority-black districts.[37] Moreover, because the districts were drawn by use of computer technology to display North Carolina's 229,000 census blocks on the computer screen,[38] and the only data then available concerned race, "homogeneity" could only be sought by relying on race. Thus, the majority's finding as to "homogeneity" of the districts stems from the very same racial stereotypes which this Court condemned in *Shaw*.[39]

36(...continued)
were placed in the First Disitrict; and from the seaport city of Wilmington 15,369 blacks and 4,660 whites were placed in the First District. [Transcript at pp. 609-611 (Cohen Testimony)] Like the "urban" Twelfth District, the "rural" First District divides twelve towns with a population of more than 10,000; and for census purposes such towns are "urban".

37 [Transcript at pp. 1028, 1037, 1041, 1046-1048 (Pope Testimony)]. If the General Assembly sought to attain "homogeneity", this goal existed only as to blacks -- and not as to whites. Any such race-based disparity of treatment would itself violate the Equal Protection Clause.

38 Likewise, the General Assembly computer was used to draft Chapter 7, the lengthy and detailed redistricting statute. (App.J.S. pp. 169a-240a) A cursory examination of this statute makes obvious that a legislator would find it impossible to draw any conclusion aabout the "internal homogeneity" of the twelve districts created by that statute.

39 The three-judge district court made this point in *Hays I*. Moreover, even if greater "homogeneity" in socioeconomic

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Even if "incumbent protection" -- another goal of North Carolina's racial gerrymander -- might sometimes be a permissible goal of redistricting, it has nothing to do with remedying past racial discrimination and is at odds with "narrow tailoring".[40] However, the North Carolina racial gerrymander went beyond "incumbent protection" to protect Eva Clayton, then only an announced candidate, by moving Vance County from another district into the First District. [Transcript at 590, (Cohen Testimony)] Also, the boundaries were drawn in a way that would permit two black members of the General Assembly to run at some future time. [Transcript at 591-592, (Cohen Testimony)] Indeed, as part of the "narrow tailoring", the North Carolina House of Representatives transferred to the First District 131 residents of Wayne County, of whom 110 were white, in order "to needle the president pro tempore of the Senate". [Transcript 611 (Cohen Testimony)]

Some black precincts in Winston-Salem, one of the largest cities in North Carolina, were at one point to be included in the majority-black Twelfth District. However, they were transferred to another district and replaced by some black populations in a smaller city, Gastonia; and these were connected to the Twelfth District by a narrow corridor. [Transcript 977 (Watt testimony)] This change

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39(...continued)
characteristics might be attained by grouping persons according to race, this is not a valid justification for such grouping.

40 Perhaps some of the incumbents being protected had been elected to office initially as a result of past discrimination against African-Americans.

was at odds with any goal of achieving "homogeneous communities of interest".[41] Once again there is revealed the absence of the "narrow tailoring" which the Court referred to in *Shaw*. *Cf. Richmond v. J. A. Croson., supra.*

The majority found that the General Assembly sought to maintain "technical territorial contiguity" (App.J.S. 109a). This refers to an effort by draftsmen of the North Carolina plan to comply in form with the standard of "contiguity" while ignoring it in substance. For example, in some instances, portions of a North Carolina congressional district will touch another only at an imaginary point shown on a computer screen. Moreover, North Carolina's plan has employed the unique and unprecedented device of the "double crossover" -- a single imaginary point at which each of two Districts is "contiguous". [42] The Court should decide whether under *Shaw* such redistricting practices are included within "narrow tailoring".

III. The District Court Misallocated The Burden Of Persuasion And Erroneously Relied On Post Hoc Rationalizations

In their answer, the defendants attempted to allege

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41 On the other hand, the transfer favored a black candidate from the Charlotte area like Melvin Watt. (*Ibid.*)

42 [Transcript at pp. 212, 276-277 (O'Rourke Testimony)]. For example, there is a "double crossover" between the First and Third Districts: no one can go from the eastern to the western part of the Third District without going through the First District; nor can anyone go from the northern to the southern part of the First District without going through the Third District.

affirmatively that the redistricting plan was "narrowly tailored" to further a "compelling State interest"; and the district court properly imposed on them the burden of producing evidence as to these defenses. It should also have placed the burden of persuasion on the defendants, for usually a party bears this burden as to its affirmative allegations and as to issues on which it must produce evidence. See 9 Wigmore, Evidence § 2486 (Chadbourne Rev. 1981); 2 McCormick, Evidence § 337 (4th Ed. 1992). Still another reason to place the burden of persuasion on the defendants was because they invoked "legislative privilege" to prevent plaintiffs from obtaining evidence about some of the events that preceded enactment of the racial gerrymander by the General Assembly.[43] *See* Wigmore, *supra,* § 2486. Under such circumstances, relieving the defendants of the burden of persuasion as to "compelling State interest" and "narrow tailoring" is inconsistent with "strict scrutiny".[44]

When the redistricting plan was enacted by the General Assembly in January 1992, it lacked census

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43 For example, when defendant Daniel Blue, the Speaker of the House, who had been active in the redistricting process, was deposed by plaintiffs, he invoked legislative privilege. When the plaintiffs subpoenaed former Assistant Attorney General John Dunne to take his deposition, the United States -- an ally of the defendants -- moved to quash the subpoena; and he never testified.

44 In *Shaw,* the Court commented that the State must have a "strong basis in evidence for [concluding] that remedial action [is] necessary". 113 S.Ct. 2832. This comment is inconsistent with allowing the burden of persuasion to be placed on plaintiffs except to show that the legislature purposefully created race-based districts which violate sound redistricting practices.

socioeconomic data which only became available a year later. Therefore, apart from data as to the racial composition of census blocks, the legislature had no basis for drawing the exceptionally contorted district lines detailed in Chapter 7 (App.J.S. 169a-240a). For the majority to attribute a benign purpose to the drawing of these lines is a "post hoc rationalization" -- correctly criticized in *Hays I*, *supra*. Under these circumstances it is "contrary to precedent as well as to sound principles of constitutional adjudication for the courts to base their analyses on purposes never conceived by the lawmakers". *See. Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 682 (1981) (Brennan, J. concurring in result).[45]

CONCLUSION

The majority opinion in the court below is at odds with the clear meaning of the Court's milestone opinion in *Shaw*. Accordingly, this Court should either summarily reverse the judgment of the court below, or should note probable jurisdiction of this appeal.

Respectfully submitted.

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45 In their zeal to sustain the redistricting plan by finding a benign legislative intent,, the majority below made numerous findings which have no evidence for support or are contrary to the overwhelming weight of the evidence.

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;

(b) the Fifteenth Amendment to the constitution of the United States, which provides in pertinent part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

(c) Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 which provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by a state or political subdivision in a manner which results in a denial or abridgement of the right to vote on account of race or color, or in contravention of the

guarantees set forth in section 4 (f) (2), as provided in subsection (b)

(b) A violation of subsection (a) is established if, based on the totality of circumstances it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a), and that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(d) Section 5 of the Voting Rights Act, 42 U. S.C. § 1973c which provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions

> set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race of color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure; *Provided*, That such qualifications, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other

appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.